

MODEL OPERATING PROCEDURE

Dealing with requests for assistance relating to the refusal of access to a person assisting the HSR

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1. DEFINITIONS

Assist	Means the inspector provides support, help and aid to the parties to encourage them to reach agreement.
HSR	Means a valid and duly elected health and safety representative or a deputy HSR
PCBU	Means person conducting a business or undertaking as described in section 5 of the <i>Work Health & Safety Act 2012 (SA)</i>
Person	Means either a natural person or an incorporated entity recognised by the law as having the rights to hold property, to enter into legal contracts, and to sue and be sued in his, her or its own name
Regulator	Means the Executive Director SafeWork SA
SWSA	Means SafeWork SA
WHS Act	Means <i>Work Health & Safety Act 2012 (SA)</i>

2. PURPOSE

To provide guidance to inspectors when dealing with unresolved issues in relation to a PCBU's refusal of access to a person assisting the HSR under *Part 5* of the WHS Act.

3. BACKGROUND

Under the WHS Act, HSRs have a range of powers and functions. The PCBU also has a number of general obligations to support the HSR in their functions.

Section 68(2)(g) of the WHS Act provides that a HSR may request the assistance of any person in exercising an HSR's power or function. This assistance may be sourced or required inside or outside the workplace. For example, the assistance the HSR seeks inside the workplace may be a fellow worker with technical expertise; and from outside the workplace may include union or association representatives, or colleagues from similar workplaces.

Section 68(4) provides that s68(2)(g) does not extend beyond :

- a person who works at the workplace; or
- a person who is involved in the management of the relevant business or undertaking; or
- a consultant who has been approved:
 - by the Advisory Council; or
 - a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents;
 - or the person conducting the business or undertaking at the workplace or the person's representative.

Section 70(1)(g) provides that one of the PCBU's obligations is to allow a person assisting the HSR to have access to the workplace if that access is necessary to enable the assistance to be provided.

Section 71(4) of the WHS Act further provides that the PCBU is not required to allow access where the person assisting the HSR:

- has had a WHS entry permit suspended; or
- the assistant's entry permit has been suspended or the assistant is disqualified from holding a WHS entry permit; or
- the PCBU has reasonable grounds for the refusal.

Note: The term 'reasonable grounds' is not defined, but it is intended that access could be refused, for example, if the assistant had previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted any work at a workplace or otherwise acted in an improper manner.

Section 71(6) of the WHS Act provides that if access is refused, the HSR may ask the regulator to appoint an inspector to **assist** in resolving the matter. In this situation, an inspector can provide advice or recommendations to help the parties reach agreement and ensure the parties understand their relevant rights and obligations as set out in the WHS Act, and can exercise any of their compliance powers. Whilst the inspector is not empowered to make a decision regarding the right of access, the inspector may support the decision of the PCBU to refuse access to the HSR's assistant.

Notes:

- (1) Section 71(3) of the WHS Act provides that the PCBU is not required to provide financial assistance to a HSR to obtain the assistance they require.
- (2) A person assisting a HSR may also be a WHS entry permit holder. In this case, the person is not seeking access to the workplace under Part 7 of the WHS Act as a WHS entry permit holder and cannot exercise any of the WHS entry permit holder's rights. If they seek to do so, they must arrange to re-enter the workplace as a WHS entry permit holder and follow the entry requirements for WHS entry permit holders.
- (3) If the PCBU fails to allow access to an HSR's assistant without reasonable grounds to do so, the PCBU is committing an offence against s70(1)(g) of the WHS Act.

4. PROCEDURE

Responsibility	Description
Help Centre	<ul style="list-style-type: none"> • Facilitate creation of InfoNET file if not already in place; and • forward the notification to the relevant line manager
Line Manager	<p>Appoint an inspector who shall commence relevant inquiries:</p> <ul style="list-style-type: none"> • where the workplace is within the metropolitan area – within 1 business day; or • where the workplace is outside the metropolitan area – within 2 business days.
Inspector	<p>Assessment</p> <p>First contact the HSR who made the request within the timeframe specified above, and:</p> <ul style="list-style-type: none"> • confirm the person making the request is a HSR as s71(6) provides that the request must come from a HSR; and • confirm the assistant is a suitable person as provided for in s68(4); and • identify all relevant parties; and • obtain preliminary information about the issue(s) in dispute.

	<p>Then contact the PCBU (or their management representative) involved to clarify the issue(s) in contention and make inquiries necessary to identify:</p> <ul style="list-style-type: none"> a) whether the PCBU believes the person the HSR seeks to have access is a WHS entry permit holder who has had their permit revoked or the permit is suspended or has been disqualified from holding a permit, and the basis for this belief; or b) what the PCBU believes are the 'reasonable grounds' for refusing access.
<p>Inspector</p>	<p>Dealing with refusal to grant access to a person assisting the HSR</p> <p>Your role in this matter is to ensure the parties understand their rights and obligations, and to assist the parties reach agreement on the issue of access.</p> <p>In this circumstance you should:</p> <ul style="list-style-type: none"> • find out if the PCBU has a problem with this particular person accessing the workplace or if the issue is with access for any person assisting the HSR; and • find out why the HSR has requested the help of this particular person and consider whether the assistance the HSR requires can reasonably be provided to them outside of the workplace; and • offer your opinion on why you consider the refusal for access is either reasonable or not; and • provide advice outlining reasonable solutions. <p>Outcomes</p> <ol style="list-style-type: none"> 1. As a result of your assistance, the HSR and PCBU reach agreement between themselves. In this case, confirm with the HSR who requested the attendance of an inspector, that the issue(s) have ultimately been resolved. (This may mean agreement in principle has been reached even though fine details are still to be negotiated); or 2. The HSR and PCBU fail to reach agreement. In this case, remind the parties the inspector's lawful role is to assist the parties resolve the matter but not to make a decision on their behalf. If agreement cannot be reached the issue will remain unresolved at the workplace level. <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Regulator's policy</p> <ul style="list-style-type: none"> • In cases where agreement about access cannot be reached, the inspector will consider entering the workplace to address the Work Health and Safety matter that caused the HSR to act in the first place; and • If you have a reasonable belief that the grounds for the PCBU's refusal to grant a person assisting a HSR access to the workplace were not reasonable as allowed under s71(4) and s71(5) of the WHS Act, advise the PCBU that the refusal is an offence under s70(1)(g) of the WHS Act, and then discuss the matter with your line manager regarding the potential for an escalated enforcement response in relation to that contravention. </div>
<p>Inspector</p>	<p>Communicate the outcome</p> <p>Communicate the outcome of your intervention in writing to the parties. If you have attended the workplace, this should be by way of an Inspection Report.</p>

Inspector	<p>File management</p> <p>Enclose copies of all information obtained and provided, the Inspection Report (or other written decision) and other file closure documents in the relevant InfoNET file.</p>
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Note: If you are attending the workplace to deal with a PIN which cites a contravention of s70(1)(g) of the WHS Act, you should first establish:

- Whether the circumstances of the refusal by the PCBU to allow a person assisting the HSR to have access to the workplace meet the provisions of s.71(4) or s.71(5) of the WHS Act (which allow the PCBU to refuse access); and
- whether access to the workplace by the person is necessary to provide the required assistance to the HSR.

If you form the reasonable belief that access by the person is necessary for the required assistance to be provided to the HSR **and** neither of sections 71(4) and 71(5) are satisfied, you can confirm the PIN (with any necessary changes such as in relation to the compliance date specified).

- Refer to MOP SAFE 11/0850 Request for review of a disputed PIN

5. FURTHER INFORMATION

- Compliance & Enforcement Policy
- Principles of Operation
- Framework For a Common Approach to Inspection Work
- Other procedures as referenced in the body of this procedure

6. REVIEW

This procedure must be reviewed 2 years after the last issue date and must be immediately modified if practices and/or procedures change.

Document Owner: Liaison Officer (Workplace Consultation) Help & Response Team

Version Control Information

- V1 – 4 Jan 2013